BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEWIS B. HARPER Claimant VS. **NU WAY** Respondent AND **KS RESTAURANT & HOSPITALITY ASSN.** Insurance Carrier	)	Docket No. 1,023,281

ORDER

Claimant requests review of the July 5, 2005 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

On claimant's first day at work as a dishwasher for respondent he fell and fractured his jaw. Claimant alleged he slipped and fell because the floor was slippery. Respondent argued claimant passed out and fell because of a personal condition. The Administrative Law Judge (ALJ) found the claimant's accidental injury did not arise out of his employment.

The claimant requests review of whether his accidental injury arose out of his employment with respondent. Claimant argues he slipped and fell and the contemporaneous medical records note claimant indicated that he fell at work.

Respondent argues the claimant passed out due to a personal condition which is not related to his employment and therefore the ALJ's Order should be affirmed.

The sole issue for Board review is whether claimant suffered accidental injury arising out of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Lewis Harper was hired as a dishwasher for the respondent. On February 24, 2005, claimant's first day of employment, he slipped and fell face down hitting his chin on the floor. An ambulance was called and claimant was taken to the hospital. On February 25, 2005, Dr. James M. Alley III performed a bilateral open reduction, internal fixation of open mandible fractures and application of arch bars, also stabilization of partially avulsed teeth.

On April 21, 2005, Dr. Alley performed another surgery on claimant's mandible. After the second surgery, claimant was released to return to work. But respondent told him there was a concern he could perform a job that required him to stand and his employment was terminated.

Claimant testified that on February 24, 2005, he was rushing to take care of the dish room, the floor was slippery and he slipped and fell. Claimant testified that there was something slick under his feet. But claimant agreed that he had just told the respondent's store manager that he was dizzy and nauseous and needed to sit down. Claimant then took a few steps and fell hitting his face on the floor without breaking his fall with his arms.

It is significant that claimant admitted he had experienced at least two prior episodes working for another employer where he had passed out, fell and injured himself. And on at least one occasion he had become lightheaded and dizzy at work before falling and injuring the back of his head.[1]

Ginger Kelley, respondent's manager, testified she was teaching the claimant how to make root beer when he told her he did not feel well and needed to sit down. She testified the claimant took "two steps and then just went flat face down, eyes wide open, hit the ground flat on his chin."[2] Ms. Kelley further described the fall:

Q. Did you physically observe him fall?

A. I physically observed him fall, yes.

Q. Did he appear to slip in any fashion?

A. No.

Q. Was there anything that you observed on the floor that you noticed or saw --

A. No.

Q. -- or witnessed that would have contributed or caused the fall?

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[1] P.H. Trans., Resp. Ex. 3.

[2] *Id.* at 27.

A. No.

Q. When he fell, did you physically notice whether he put his hands out or in any way attempted to break the fall?

A. No, he didn't.[3]

Christopher Stong, respondent's vice-president, testified the floor was "bone dry." He had responded to Ms. Kelley's shouts for help and had sat on the floor next to the claimant.

Because the accident occurred while claimant was at work, the accident occurred in the course of claimant's employment. However, the accident must also arise out of the employment before it is compensable under the Kansas Workers Compensation Act.[4] The phrase "out of" employment points to the cause or origin of the worker's accident and requires some causal connection between the accident and the employment. An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[5]

The Board finds a nexus between claimant's feeling dizzy and nauseous and his fall. Claimant had said he was not feeling well and needed to sit down and he had a history of becoming dizzy and falling. Rather than being an unexplained fall, this would be a personal condition of the employee.[6] Where an employment injury is clearly attributable to a personal condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. But where an injury results from the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed.[7]

In *Bennett*, the claimant's personal epileptic condition caused him to black out. But it was the fact that he was driving the employer's vehicle that subjected him to an additional risk. Professor Larson agrees that the effects of a fall can become compensable if

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[3] *Id.* at 27-28.

[4] *See Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[6] *See* 1 *Larson's Workers' Compensation Law* § 9.01[1].

[7] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

conditions of employment place the employee in a position to increase the effects of the fall, such as in a moving vehicle.[8]

Here, we have a personal condition of the claimant with no additional risk from his employment. Claimant became dizzy and nauseous and told his supervisor he needed to take a break and sit down. As he started to walk to go sit down he simply fell over and struck the floor with his face without breaking his fall with his hands. Claimant had a history of becoming dizzy and falling. And the witness to the fall did not observe a slip and fall. The Board finds the fall experienced by claimant was caused by his personal condition. Therefore, the Board finds that injury did not arise out of claimant's employment with respondent and the award denying claimant benefits in this matter should be affirmed.

Moreover, there is no concurrent risk from claimant's employment. Claimant had become dizzy and was simply walking to find a place to sit down when he fell forward hitting his face on the floor. The Board does not find the fact that claimant was walking on a dry tile floor to constitute a hazard of employment. This case is thereby distinguishable from a claimant's automobile crashing into a tree during an epileptic seizure as in *Bennett* or falling into an open pit on the job site as in *Baggett*.[9]

As provided by the Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing on the claim.[10]

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Thomas Klein dated July 5, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2005.

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BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

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[8] 1 *Larson's Workers' Compensation Law* § 9.01[2].

[9] *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

[10] K.S.A. 44-534a(a)(2).